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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No. 213

SOUTHERN PACIFIC COMPANY
(a corporation),
Petitioner,

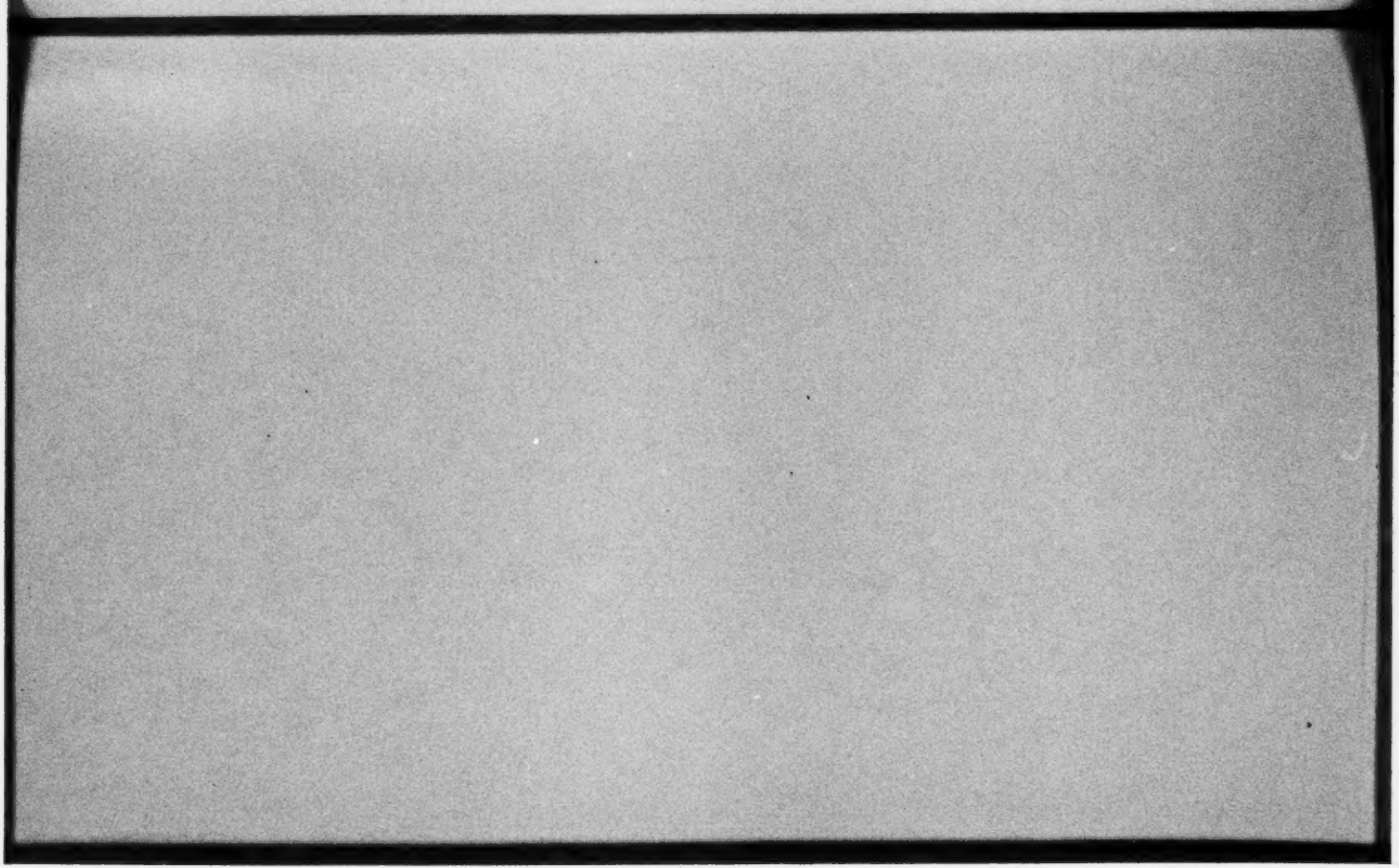
vs.

GLADYS VIOLA HAIGHT,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

GEORGE R. FREEMAN,
Willows, California,
WILLIAM H. DEVLIN,
A. I. DIEPENBROCK,
HORACE B. WULFF,
Sacramento, California,
Counsel for Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA



Subject Index

	Page
Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit	1
Summary of Statement of Matters Involved	1
Jurisdiction	6
The Questions Presented	6
Reasons Relied on for the Allowance of the Writ	8
Brief	10
Prayer	10
Brief in Support of Petition for Writ of Certiorari	13
Preliminary Matter	13
Specification of Errors	13
Summary of the Argument	15
Argument	15
(1) No duty under California law to maintain at country crossing any warning device other than the standard crossing sign (during the existence of inclement weather) for the purpose of notifying travelers of the existence of such crossing, and particularly where such travelers knew of the location of the railroad crossing, and appreciated that they were approaching such crossing	15
(2) No violation of General Order 75-A of the Railroad Commission of the State of California	21
Conclusion	26

Table of Authorities Cited

Cases	Pages
Baltimore & O. R. Co. v. Reeves, 10 Fed. (2d) 329 (C. C. A. 6)	23
Berry v. St. Louis & S. F. R. R. Co., 118 Fed. 911	6
Bowers v. Great Northern Railway Co., 295 N. W. 99, 99 A. L. R. 1443	5n, 25n
Buffum v. Peter Barceloux Co., 289 U. S. 227	6
Driskell v. Powell, 67 Fed. (2d) 484	5n, 20, 25n
Dunlap v. Pacific Electric Ry. Co., 12 Cal. App. (2d) 473 (55 Pac. (2d) 894)	8n, 9n, 10n, 16, 20, 21
Erie Railroad Co. v. Tompkins, 304 U. S. 64	6
Fields v. Chicago B. & Q. Ry. Co., 14 Fed. 332	23
Gallagher v. Montpelier & Wells River R. Co., 137 Atl. 207	24n
Gregoriev v. Northwestern Pacific R. R. Co., 95 Cal. App. 428 (273 Pac. 76)	19n
Gulf, etc. R. Co. v. Holifield, 120 So. 750	24n
Harper v. Northwestern Pacific R. R. Co., 34 Cal. App. (2d) 451 (43 Pac. (2d) 821)	8n, 9n, 10n, 17, 18, 19, 20, 21
Koster v. Southern Pacific Co., 207 Cal. 753 (279 Pac. 788)	19n
Lawrence v. Southern Pacific Co., 189 Cal. 434 (208 Pac. 966)	19n
Missouri Pacific R. Co. v. Price, 33 S. W. (2d) 366	24n
Morley v. Cleveland, etc. R. Co., 194 N. E. 406	24n
New York R. Co. v. Bowles, 171 N. E. 844	24n
Powers v. Chesapeake etc. R. Co., 169 U. S. 92	6
Reines v. Chicago, M. St. P. & R. Co. (Supreme Court Washington), 80 Pac. (2d) 406	20
Rosenbloom v. Southern Pacific Co., 59 Cal. App. 102 (210 Pac. 53)	19n
Ruhlin v. New York Life Ins. Co., 304 U. S. 202	6, 21

Page

Texas & N. O. R. Co. v. Stratton, 74 S. W. (2d) 464..... 24n

Yardley v. Rutland R. Co., 153 Atl. 195..... 24n

Codes and Statutes

Act 6386, General Laws of the State of California, Section 43(b), Statutes of California, 1933, page 2227..... 21

Judicial Code, Section 28 amended, Title 28 USCA Sec. 71 6
Judicial Code, Section 240(a) amended, 28 USCA Sec. 347 6

Miscellaneous

93 A. L. R. 218..... 24n

Rules of United States Circuit Court of Appeals for the Ninth Circuit, Rule 25..... 6
Rules of the Supreme Court of California, Rule XXX, Section 6 9

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

SUMMARY OF STATEMENT OF MATTERS INVOLVED.

This is an action originally commenced by respondent (a citizen and resident of the State of California)

in the Superior Court of the State of California, in and for the County of Siskiyou, against the defendants, Southern Pacific Company, petitioner herein (a corporation organized under the laws of Kentucky), and two members of a crew of its train sued under fictitious names (crew members being residents and citizens of California), whereby plaintiff sought to recover damages for injuries sustained in an accident occurring at an intersection of railroad tracks and a public highway in the vicinity of Dorris, California, when the automobile in which respondent was riding as a guest struck a car of a freight train owned and operated by the Southern Pacific Company, while said train was slowly moving over said highway intersection. When said case was called for trial in said California Superior Court, the respondent elected to proceed to trial against the non-resident defendant Southern Pacific Company alone (the resident defendants not having been served or appeared). The case was then and there removed to the United States District Court, in and for the Northern Division of the Northern District of California.[1] In the trial before the United States District Court the jury returned a verdict for respondent in the sum of $18,500.00 and judgment in that sum was entered in respondent's favor.

The respondent's complaint charges that the collision and injuries were caused by the negligence of the defendants in failing to maintain at said intersection a

[1]The removability of said cause to the United States District Court was approved in the opinion of the Circuit Court of Appeals. (R. 560 to 572.)

flagman or electric bell, light or gate or other mechanical warning signal to warn or notify motorists crossing said railroad tracks of the presence of trains or cars upon said tracks.

The collision occurred under the following circumstances:

On the evening of March 6, 1935, and shortly before the accident, the respondent as a guest passenger with her two companions arrived in a Ford coupe at a private home in Dorris, during a light snowfall, for the purpose of an evening's entertainment. The entertainment failed to materialize and the parties (8:45 P. M.) decided to drive to Klamath Falls, Oregon (a distance of 26 miles) to attend a motion picture theatre. As they started to drive from the residence, which was distant approximately 2370 feet from the railroad crossing (Map, Defendant's Exhibit "A"), the snowfall increased to such extent as to decrease the visibility to 15 to 20 feet (R. 118, 154, 230), or, as respondent admitted, 12 to 14 feet. (R. 251.) The automobile proceeded to the crossing at a constant rate of speed between 10 and 15 miles per hour. (R. 119, 154, 230.) The respondent testified that they did not see the train through the headlights of the car in which they were riding until they were about 12 to 14 feet from it. (R. 251.) The eastbound automobile collided with the slowly moving train, at a time when the engine of the southbound train was at a point 1760 feet south of the crossing and the rear end of the caboose 1557 feet north of the crossing. The crossing was protected by two standard, wooden cross-arm signs. The one on the west side of the track was on

the north side of the highway approximately 4½ feet from the edge of the graveled (traveled) shoulder of the highway (R. 47, 46), and the one on the east side was approximately the same distance from the traveled shoulder but on the south side of the highway. There were no lights, wig-wag or other form of automatic or mechanical signals at the crossing at the time. The crossing was an open country crossing with no obstructions to view, no buildings in and about said crossing, and a view of 1800 feet and more could be had down the track on each side of the highway crossing. There was no travel upon the highway except respondent's automobile. The respondent and her companions (being residents of the town of Dorris) knew the exact location of the crossing, and had been over it many times both day and night (R. 138, 139, 243) and, further, knew that there were no lights, wig-wag or other mechanical warning devices at said crossing. (R. 157, 242, 243.) As they were approaching the crossing, respondent and her companions had located themselves and knew the crossing was a short distance ahead of them (R. 243, 259), and the respondent admitted that she was uneasy for she could not see very far and she knew the crossing was in front of her. (R. 247.)

Defendant's motion for a directed verdict was denied (R. 477) and the Court, in submitting the case to the jury, instructed the jury that they could not find the defendant negligent in failing to regularly maintain any human or automatic flagman or any light, bell, gate or mechanical signal at said crossing, since said crossing was not under ordinary circumstances more than ordinarily dangerous. (R. 488.) However,

the Court did instruct the jury that if they found that said snowstorm would require some sort of signal or warning of the presence of said train at said crossing, then the crew of said train was required to give this protection by providing a flagman or some other means of warning to travelers of the presence of their train. (R. 490.)[2] The Court further instructed the jury that if they found that the defendant violated SubdivisionV of General Order 75-A of the Railroad Commission[3] "*at the time and place of this accident* in failing to locate its crossing sign in a conspicuous position facing highway travel", then the jury could find the defendant negligent. (R. 489.) Motion for judgment in favor of the defendant, pursuant to Rule 50B of the Rules of Civil Procedure and in the alternative motion for new trial were made and denied. (R. 31, 37.) The Circuit Court of Appeals affirmed the judgment of the lower Court upon a divided Court, Honorable Bert Emory Haney filing a dissenting opinion (R. 587), contending for a reversal of the lower Court on the ground that there was no proof of any negligence on the part of the defendant, and in so contending stated that "the majority opinion is based on a misconception of, and refusal to apply the California law", and "in addition, the majority does not consider some of the facts and questions presented". (R. 587, 588.)

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[2]No negligence of the train crew in this regard was proven in that the evidence showed that the crew had no opportunity to reach the crossing and provide protection for the same from the time the heavy snowstorm commenced to the time of the accident, a period of about 2 minutes, or the time it would have taken the respondent's automobile to travel 2370 feet at 10 to 15 miles per hour. (See *Bowers v. Great Northern Railway Co.*, 295 N. W. 99, 99 A. L. R. 1443; *Driskell v. Powell*, 67 Fed. (2d) 484.)

[3]Said General Order is set forth in the Appendix hereto.

JURISDICTION.

The date of the judgment of the Circuit Court of Appeals to be reviewed is April 2, 1942 (R. 599) which, with the Court's opinion, is reported in 126 Fed. (2d) 900. (R. 560 to 599.) Within time (Rule 25, Rules of the United States Circuit Court of Appeals for the Ninth Circuit) petitioner applied for a rehearing by said Circuit Court of Appeals, which was denied on May 16, 1942. (R. 600.) The judgment sought to be reviewed thus became final.

The jurisdiction of the trial Court, the United States District Court in and for the Northern Division of the Northern District of California, was founded upon Judicial Code Section 28 Amended, Title 28 USCA § 71. The cases believed to sustain the jurisdiction of said District Court and the removability of said cause from the state Court are *Powers v. Chesapeake etc. R. Co.*, 169 U. S. 92, and *Berry v. St. Louis & S. F. R. R. Co.*, 118 Fed. 911. The statutory provisions under which jurisdiction of this Court is invoked is the Judicial Code Section 240(a) Amended, 28 USCA § 347. The cases believed to sustain the jurisdiction of this Court to review decisions of the Circuit Court of Appeals are: *Erie Railroad Co. v. Tompkins*, 304 U. S. 64; *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202, 206, and *Buffum v. Peter Barceloux Co.*, 289 U. S. 227.

THE QUESTIONS PRESENTED.

The principal questions involved are as follows:

1. Whether, under the law of the State of California, there was a duty upon a railroad company to

provide a flagman, red flares or some other means of warning to travelers that a train is being operated over a highway crossing, when inclement weather was prevailing, and whether, under said state law, after a train reaches the crossing the duty of the flagman or other warning device ends as to that train.

2. Whether, under the law of the State of California, railroad companies are obligated to maintain devices to warn travelers on the highway of the presence of a railroad crossing, in such a manner that such warnings are actually effective and visible to travelers under all anticipated weather conditions.

3. Whether, under the law of the State of California, railroad companies are under the duty to effectively advise travelers, who knew of the existence and location of the railroad crossing and who also appreciated at the time that they were approaching said crossing, that a railroad crossing is located in the vicinity.

4. Whether, under a General Order of the Railroad Commission of the State of California,[4] railroad companies are obligated to maintain a wooden railroad crossing sign in such a position and in such a manner that the same is visible to the traveler when the latter's vision is limited by a snowstorm to but 13 feet.

The foregoing questions were involved and were decided by the Circuit Court of Appeals to the prejudice of petitioner (appellant below) and thereupon the petitioner petitioned the Circuit Court of Appeals for a rehearing and reargument to correct assigned errors

[4]Said General Order is set forth in the Appendix.

in its decision. The petition for rehearing was denied. (R. 600.)

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals has decided important questions of local law in a way in conflict with applicable local decisions in this:

(a) That the Circuit Court of Appeals by its decision refused to follow the applicable decision of the Appellate Court of the State of California[5] in holding that railroad companies must effectively warn the traveling public of the presence of trains which are then and there being operated or moving over highway crossings;

(b) That in holding that the railroad companies are obligated to maintain crossing signs or other devices at a crossing to warn or notify the traveling public of the presence of a railroad crossing, in such manner that such warnings are actually effective and visible to travelers during the existence of heavy snowstorms, fog or other inclement weather conditions, and in so holding said Circuit Court of Appeals misconstrued and misapplied an inapplicable decision of an Appellate Court of California[6] and erroneously

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[5] *Dunlap v. Pacific Electric Ry. Co.*, 12 Cal. App. (2d) 475, 55 Pac. (2d) 894, which holds under similar weather conditions that when a moving train reaches a crossing the duty of the flagman or other warning device ends as to that train, as the train itself is a sufficient warning and the railroad company can presume that automobiles bearing sufficient headlights would not crash into a moving train.

[6] *Harper v. Northwestern Pacific R. Co.*, 34 Cal. App. (2d) 451, 93 Pac. (2d) 821.

deemed such decision to modify the controlling decision of said California Court.

(c) That in holding that the railroad company owed a duty to effectively advise a traveler of the location of the railroad crossing, when such traveler knew of the location of said crossing and also appreciated at the time that she was approaching said crossing.

(d) That in holding that the General Order of the Railroad Commission of the State of California provides that the crossing sign must be placed on either side of the railroad crossing in such a position that said sign can be seen when the traveler's vision is limited by a snowstorm to but 13 feet, and by so holding the Circuit Court of Appeals has placed an untenable construction upon such General Order and thereby created a duty upon railroad companies generally which is impossible of performance.

2. The Circuit Court of Appeals has decided important questions of local law in a way in conflict with state law as yet unannounced by the highest Court of the state (the Supreme Court), in holding that a decision of a District Court of Appeal[7] overruled and modified the decision of another District Court of Appeal of the State of California,[8] when the highest Court of said state (Supreme Court) had denied a petition for transfer and hearing in the former case.[9]

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[7]*Harper v. Northwestern Pacific R. Co., supra.*

[8]*Dunlap v. Pacific Electric Ry. Co., supra.*

[9]Under the Rules of the Supreme Court of California, Rule XXX, Section 6 (see Appendix), one of the grounds necessary to obtain a hearing therein of decisions of a District Court of Appeal is that such hearing is necessary to secure uniformity of decision, and hence it is reasonable to assume that the Supreme Court in

3. The Circuit Court of Appeals in construing a General Order of the Railroad Commision, which provides that a crossing sign must be maintained at each railroad-highway crossing in a conspicuous position, to mean that such sign must be maintained in the most conspicuous position under the most adverse weather conditions (a matter which has not been before the Supreme Court of the State of California, or any other Appellate Court in said state) adopted a construction which is untenable and in conflict with applicable decisions of other jurisdictions.

BRIEF.

A brief in support of petition is filed herewith.

PRAYER.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Honorable Court on a day certain to be therein designated a full and complete transcript of the record and all proceedings in said case numbered and entitled in said Court No. 9775, Southern Pacific Company, a corporation, appellant, v. Gladys Viola

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denying the petition in the *Harper Case* determined that there was no conflict between it and the *Dunlap Case*, but, as Judge Haney pointed out in the dissenting opinion in the instant case, the *Harper Case* involved additional conditions not present in the *Dunlap Case*.

Haight, appellee, to the end that said case may be reviewed and determined by this Court as provided by law and that said judgment of said United States Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Court may seem meet, just and proper.

Dated, Sacramento, California,
July 1, 1942.

GEORGE R. FREEMAN,
WILLIAM H. DEVLIN,
A. I. DIEPENBROCK,
HORACE B. WULFF,
Counsel for Petitioner.